In the
Supreme Court of the United States

OCTOBER TERM, 1965

No. 939

S. D. WARREN COMPANY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITIONER'S REPLY BRIEF

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

On page 8 of its "corrected" Brief in Opposition to Petitioner's Petition for Writ of Certiorari, Respondent in its attempt to show that there is no conflict between the Decision of the Court of Appeals below (Pet. 20-30), and the Decision of the Court of Appeals for the Fourth Circuit in the case of *Royal McBee Corp.* v. *N.L.R.B.*, 302 F.2d, 330 (Pet. 45-49), makes a flagrant misstatement of National Labor Relations Board law.

Respondent asserts:

> "Since there was no effort in the present case to sever a craft unit from a pre-existing plant-wide unit, *the situation with which the Board's American Potash doctrine deals* — that doctrine is completely inapplicable. . ." (Emphasis added)

Although the facts in *American Potash* itself (107 N.L.R.B. 1418) arose in a context which involved severance, it is virtually hornbook labor law that the Board has never limited the application of the "four favored industries" *American Potash* doctrine to only severance cases. Rather, it has consistently applied that discriminatory doctrine to situations — like the instant case — involving the *initial establishment* of bargaining units in previously unorganized integrated operations.[1] Therefore, because the Board's doctrine of discrimination based upon identity of industry — which the Court below upholds and the Fourth Circuit rejects — does not itself distinguish between *severance* and *initial establishment* of bargaining units the conflict of Circuits is manifest even if *Royal McBee* did, in fact, involve "severance" (as it does not).[2]

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[1]See: *The American Brass Co.*, 120 N.L.R.B. 1276, 1277; *Southwestern Portland Cement Co.*, 110 N.L.R.B. 1388, 1389-1390; *Rayonier, Inc.*, 110 N.L.R.B. 1191, 1192; *E. I. DuPont* (Houston Plant) 126 N.L.R.B. 885, 886, *Lord Baltimore Press*, 128 N.L.R.B. 334, 336; *E. I. DuPont* (Savannah River Plant) 111 N.L.R.B. 649, 650; *Vanadium Corporation of America*, 117 N.L.R.B. 1390, 1392-1393. Cf: *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 270 F.2d 167, 175 (4th Cir., 1959) *cert. den.* 361 U.S. 943 (1960. Compare: *Kaiser Aluminum*, 119 N.L.R.B. 695, 698-699, where the Board specifically said the *American Potash* doctrine would be applied to preclude initial establishment of fragmented units in any of the "four favored industries."

[2] The fact situation in *Royal McBee* involved the initial establishment of bargaining units in a wholly unorganized new plant in Missouri. (Pet. 45-49). To characterize that situation as "severance" (Respondent's Brief, p. 8) because a predecesso: plant a thousand

In short, there is a conflict in the Circuits as clearly recognized by the Court of Appeals below (Pet. 30), and the Respondent's strained and erroneous comments thereon serve only to sharpen the dichotomy between the Circuits and emphasize the need for resolving the conflict.

Conclusion

For the reasons aforesaid and those previously submitted, this Writ of *Certiorari* should be granted.

Respectfully submitted,

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miles away had a plant-wide unit puts a strain on the word it simply will not bear. There was absolutely no existing unit to sever anything from. The Fourth Circuit in *Royal McBee* did not even remotely allude to any distinction based upon severance versus initial establishment. Similarly, the Board in its Brief to the Court of Appeals in this case never mentioned such distinction. In its initial opinion the Court below appeared to rely in part upon such distinction. But upon having this error pointed out to it by Petitioner in its Petition for Rehearing (R.A. 897, 907), the Court subsequently abandoned any such reliance (Pet. 30, 33). Actually, the first mention by the Board of this purported distinction in these lengthy proceedings arose on page 8 of the initial version of Respondent's Brief to this Court in opposition to Petitioner's Petition for *Certiorari* where Respondent confused the facts in *Royal McBee* with the facts in another Fourth Circuit case not here pertinent. Upon being advised of such error by Petitioner's counsel, Respondent submitted a "corrected" copy of page 8 of its Brief deleting the incorrect facts from the other case but still leaving unchanged the basic misstatement of Board law vis-a-vis, severance and initial establishment of fragmented units in integrated industries.